STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(SERVITTO, P.J., TALBOT, AND SCHUETTE, JJ)

CARL STONE and NANCY STONE,

Plaintiffs-Appellees,

DAVID A. WILLIAMSON, M.D.
JACKSON RADIOLOGY
CONSULTANTS, P.C., and
W.A. FOOTE MEMORIAL HOSPITAL,
jointly and severally,

Defendants-Appellants.

/

Supreme Court
No. 133986

Court of Appeals
No. 265048

Jackson County Circuit Court
No. 03 1912 NH

REPLY BRIEF FOR DEFENDANTS-APPELLANTS DAVID A. WILLIAMSON, M.D., JACKSON RADIOLOGY CONSULTANTS, P.C., AND W.A. FOOTE MEMORIAL HOSPITAL

ORAL ARGUMENT REQUESTED

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ARGUMENT

I THE SECOND SENTENCE OF MCL 600.2912A(2) APPLIES HERE.

Plaintiff, and amicus supporting plaintiff's position, contend that the second sentence of MCL 2912a(2) does not apply because that sentence was only intended to restore the pre-*Falcon v Memorial Hospital,* 436 Mich 442 (1990), "more probable than not" standard, and applies only to a *Falcon*-type case (in which the initial opportunity was less than 50%), and/or does not apply to cases in which injuries were already "suffered." The fundamental problem with such an interpretation is that it would render the second sentence of §2912a(2) either meaningless or nonsensical.

The second sentence of §2912a(2) provides that "[i]n an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." The statute does not eliminate loss of opportunity claims altogether. If this sentence merely eliminated *Falcon* and the "loss of opportunity" and restored a "more probable than not" standard, it would be a repetition of the first sentence's "more probable than not" requirement, both unnecessary and meaningless. More importantly, its language—"the plaintiff cannot recover for loss of an opportunity…unless…" makes no sense unless the Legislature actually intended to allow a "loss of opportunity" case to proceed if a particular threshold was met.

In fact, even two of the amici groups supporting plaintiff's position acknowledge that the Legislature in §2912a(2) did not eliminate "loss of opportunity" actions, but recognized and allowed a "true" lost opportunity cause of action, if the requirement of proof can be met (amicus Citizens for Better Care, p 29; amicus Michigan Association For Justice, p 8). The insurmountable problem plaintiff and amici face is that although the statute recognizes and allows a loss of opportunity theory if properly proven, plaintiff and amici advocate defining

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"loss of opportunity" such that there is no possible case to which the second sentence of §2912a(2) could apply. Plaintiff and amici assert that a "true" loss of opportunity case is one in which the plaintiff cannot show that, more probably than not, he or she would have survived or achieved a better result absent malpractice. If a plaintiff cannot make this showing, however, then the plaintiff cannot proceed under the second sentence of §2912a(2).

Plaintiff and amici have never even attempted to answer this conundrum. Plaintiff contends that the second sentence "only applies where a plaintiff is for some reason going to make a specific claim to recover for the very specific injury of lost opportunity..." (plaintiff's brief, p 27), but cannot explain when or how that would ever occur.

As a further demonstration of why plaintiff's interpretation is inconsistent with the language of §2912a(2), consider this example. All possible "loss of opportunity" cases fall into one of three groups: (1) persons who have an "initial" opportunity of less than 50% and a post-malpractice opportunity of less than 50% (the *Falcon* case); (2) persons who have an initial opportunity greater than 50% and a post-malpractice opportunity of less than 50%; and (3) persons who have an initial opportunity greater than 50% and a post-malpractice opportunity greater than 50% (the instant case). Under plaintiff's interpretation, the first group would not recover at all, and the second and third groups could establish "probable" causation, so that only the first sentence of §2912a(2) would apply. There is no case in which the second sentence of §2912a(2) would ever apply or be "elected" by the plaintiff.

It may be correct to say that this case is unlike *Falcon* (because *Falcon* involves an "initial" opportunity of less than 50%), or that language in some Michigan cases before enactment of §2912a(2) suggests that "loss of opportunity" was once applied to cases in which the initial opportunity was less than 50% (where plaintiff was unable to establish "probable" causation). This, however, does not establish that §2912a(2) applies only to cases

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with an initial opportunity less than 50% (where "probable" causation cannot be shown), because the language of §2912a(2) cannot be forced into such an interpretation.

Amicus for the Michigan Association for Justice applies a unique rule of statutory construction--that a statute should be interpreted solely with reference to the dissenting opinion in a prior Supreme Court decision. Assuming that §2912a(2) was a response to *Falcon,* this does not answer these questions: (1) to what holding in *Falcon* was the Legislature responding? and (2) what was the response? Merely because the *Falcon* dissent focused on one aspect of that decision does not mean that the Legislature meant to codify the dissenting opinion; it would be mere speculation to so assume, particularly where the language of the statute does not support that.

In fact, §2912a(2) is not merely a response to *Falcon* or a restoration of pre-*Falcon* causation. The statute goes beyond *Falcon,* recognizing, or at least addressing, a cause of action for the loss of an opportunity "to achieve a better result" that was never recognized in *Falcon* (and subsequently was rejected in *Weymers v Khera,* 464 Mich 639 (1997)).

The argument of amicus The Michigan Association for Justice, that a case in which the plaintiff has already "suffered an injury" is not a "loss of opportunity" case, but rather is subject only to the first sentence of section 2912a(2), rests on the incorrect assumption that the two sentences of §2912a(2) are mutually exclusive. This proposition was rejected in *Wickens v Oakwood Healthcare System,* 465 Mich 53 (2001), where this Court applied a requirement from the first sentence of §2912a(2)--that the plaintiff has "suffered an injury"--to preclude what was indisputably a "loss of opportunity to survive" claim brought by a living plaintiff under the second sentence of §2912a(2).

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More importantly, *Wickens* made it very clear that where no injury has been suffered, no cause of action exists at all under §2912a(2). Thus, although amicus acknowledges that

the Legislature did not intend to eliminate "loss of opportunity" cases (brief, p 8), amicus's suggested exclusion of cases where an injury "has been suffered" from the definition of "loss of opportunity" leaves no case to which the second sentence of §2912a(2) would apply.

Defendants' interpretation would not result in "every" medical malpractice case falling within the second sentence of §2912a(2). Rather, the cases falling within that definition would be those cases in which, as stated in the dissent in *Falcon, 493,* "there is no clear answer to the question of whether 'any human act or omission' caused the injury or death." While the first sentence of §2912a(2) sets forth the traditional, "probable" cause-in-fact standard, the second sentence of §2912a(2) can be seen as the Legislature's imposition of a "legal" cause requirement, a definitive policy answer to the difficult problems of causation in the delay-in-diagnosis and treatment cases that gave rise to the theory of "loss of opportunity" in medical malpractice. As part of a tort reform act that limits and defines the liability of health care providers, §2912a(2) is an expression of the same "social idea of justice or policy" that gives rise to common-law formulations of proximate cause. See *Falcon, supra* (dissenting opinion by Justice Riley, p 491, discussing the "weighing of social interests" that limits "how far the consequences of negligence will extend").

As Justice Riley pointed out in her *Falcon* dissent, a physician "serves a vital function in our society," and medicine is "an inexact and often experimental science." *Id.* at 492. The second sentence of §2912a(2) is the Legislature's weighing of the nature of medicine and the difficulties of determining physician responsibility in such cases, resulting in a policy decision to limit the consequences of negligence by applying a more stringent causation requirement.

Plaintiff's characterization of the defendants' interpretation of §2912a(2) as resting on a distinction between "omission" and "commission" is not correct. The distinction is between a case in which injury or death is caused by an underlying condition or disease that is in

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progress and which the health care provider fails to intervene to stop or lessen, and a case in which the patient suffers an injury not due to that underlying condition, but rather to an injury inflicted by the health care provider either by administering a drug or performing a procedure. It is the first category of cases, not the second, in which the "loss of opportunity" doctrine has been applied, and in which the troubling question of the extent of the physician's contribution to or responsibility for the injury arises, and the result in uncertain.

"Misfeasance" versus "nonfeasance" is not really the issue here, because "misfeasance" (misreading x-rays, giving the "wrong" drug instead of the "right" drug) could still be a "loss of opportunity" if the claim was based on injury or death caused by an underlying condition which a doctor failed to properly diagnose or treat. Unlike the definition plaintiff offers, this definition of "loss of opportunity" will give effect to all of the language of §2912a(2) and make sense of that language.

II *FULTON V WILLIAM BEAUMONT HOSPITAL* WAS CORRECT.

Plaintiff's position is that *Fulton v Wm Beaumont Hosp,* 253 Mich App 70 (2002), is wrong because plaintiff need only establish that the "initial" opportunity was greater than 50% (plaintiff's brief, pp 34-35). Such an interpretation renders the language of the second sentence of section 2912a(2) meaningless and/or nonsensical.

Plaintiff correctly notes that the defendants in *Fulton* did not support the reasoning of the Court of Appeals in their merit brief to this Court, but fails to acknowledge that even under the alternative posed there, defendants in this case would still prevail. Defendants in *Fulton* submitted that §2912a(2) requires a plaintiff to demonstrate both an "initial" opportunity to survive greater than 50%, and a post-malpractice opportunity of less than 50% (the opportunity must be reduced from over 50% to under 50%). The *Fulton* defendants submitted that only this showing establishes that the plaintiff suffered a "loss of opportunity"

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that was "greater than 50%." This was because, if the opportunity remained greater than 50%, there was no "loss" of an opportunity "greater than 50%." As with *Fulton*, it is the effect of the malpractice, and not the extent of the initial opportunity, that is the focus.

Here, plaintiff can establish an initial opportunity to avoid amputation of greater than 50%. Plaintiff, however, cannot establish a post-malpractice opportunity to avoid amputation of less than 50%. The opportunity to avoid amputation here was reduced from 99% to 95%. Even under the alternative posed by the *Fulton* defendants, plaintiff could not prevail.

Plaintiff's contentions regarding "improper" grammar and logic are addressed by reading "the opportunity" that "was greater than 50%" as referring to the same "opportunity" that was lost.. There is no need to insert additional language into the statute to support the *Fulton* conclusion. The lost "opportunity" is singular, no longer exists, and is consistent with other use of the term. Plaintiff's contention that *Fulton* yields "anomalous results" because it would not allow "substantial" reductions (such as from 100% to 50%) also fails, because a Legislative redefinition of "substantial" as 'greater than 50%" is not "anomalous."

The contention by amicus Citizens for Better Care that *Fulton* is wrong because it does not permit a "true" lost opportunity case is illogical. It is not *Fulton* that bars the "true" lost opportunity case, but, rather, the definition of a "true" lost opportunity case offered by amicus in combination with the language of §2912a(2). There is no possible interpretation of §2912a(2) that would ever allow the amicus-defined "true" lost opportunity case.

As to the alternative Waddell formula, plaintiff and at least one amicus (Citizens for Better Care) reject the Waddell formula on the basis that it "rewrites the second sentence of the statute...," leads to anomalous results, and is inconsistent with §2912a(2), or because it is not applicable to a "true" loss of opportunity case (plaintiff's brief, p 42). Dr. Waddell is, in fact, the only one who supports application of his own formula.

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Dr. Waddell's formula fails for the same reasons previously discussed. The example he offers in his amicus brief is also flawed, because he "stacks the deck" by positing that 50% of patients are treated negligently (an extremely unlikely scenario). The proportion of patients treated negligently versus non-negligently controls the outcomes because the probability of a good outcome is not only dependent on the likelihood of that outcome with particular treatment, but also on the likelihood of receiving that particular treatment.

Likewise, the "probability-causation" model offered by amicus Citizens for Better Care does not, apparently, address application of the second sentence of §2912a(2), which amicus consistently asserts does not apply here (or, for that matter to any case). Defendants do not understand the purpose of this model. In any case, the premise of that model, and thus the model itself, is faulty because it incorrectly posits that the patient group is made up entirely of three distinct groups. In fact, these groups overlap, and amicus has entirely left out a fourth group--the group of persons who are actually harmed by the "proper" treatment.

Finally, the suggestion by amicus Michigan Association for Justice that *Fulton* is wrong because it relies on a comparison between probabilities rendered unnecessary where the outcome for Mr. Stone is known, makes little sense. We know that Mr. Stone had a double amputation, but we do not know if he would have avoided injury with elective surgery. That is the central difficulty in "loss of opportunity" cases; we cannot compare a known outcome to a known outcome (as with the oversimplified car accident example, injury versus no injury) because the other outcome is not known. The only fair and accurate comparison is between the probabilities of a specific result with or without treatment.

III DETERMINATION OF THE OPPORTUNITY LOST.

Plaintiff contends that, even if the second sentence of §2912a(2) applies here, the "better result" he sought was to avoid the rupture, and that the rupture, not the amputation,

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was the "injury." Plaintiff therefore contends that recovery should be had because there was a 100% chance of rupture, and/or that the "other bad results" of failure to repair a rupture, including death or other serious complications that did not occur here, should be considered.

In contending that the "injury" is the rupture, or that the "better result" is avoidance of rupture, plaintiff ignores the language of §2912a(2) providing that plaintiff "cannot recover for" loss of an opportunity unless plaintiff can establish that the opportunity was greater than 50%. The "better result" is the result for the loss of opportunity to achieve which plaintiff is seeking to recover damages. The damages plaintiff was awarded were not for rupture, but for the amputation, to which the proofs were directed (and on which plaintiff focuses in the brief).

Although plaintiff relies on *Wickens, supra,* the *Wickens* Court did not hold that the plaintiff could proceed for injuries already suffered without meeting the requirements of the second sentence of §2912a(2). This Court in *Wickens* did hold that a living plaintiff could not recover for loss of an opportunity to survive, and that statistics on survival have nothing to do with the chance of avoiding other injuries. *Wickens* precludes consideration of death or injuries not suffered to determine whether plaintiff can recover for the amputation.

Plaintiff's contention that a "better result" would have been not to rupture and risk certain complications that did not occur, misses the point. The "better result" must be compared with the result that actually occurred. In this case, merely surviving with complications is not a "better" result than the result plaintiff actually obtained. Only living without amputation and any other complications plaintiff actually suffered is a "better" result.

Plaintiff's contention that it is "illogical" that plaintiff would not have a cause of action, or that plaintiff is "penalized" for survival, is incorrect and based on a false premise. Survival is no "penalty," any more than precluding the living plaintiff in *Wickens, supra* from bringing a claim for loss of opportunity to survive because she had not yet died was a

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"penalty." That a person can meet the burden of proof as to one injury but not another is not "illogical," but completely consistent with differing medical probabilities.

It is also not correct to assert that no person who survives the rupture could ever have a cause of action, based on testimony that only 10% to 20% of persons who rupture survive. Regardless of the number of survivors, a survivor may still have a greater than 50% chance of avoiding complications. If he does not—or if plaintiff failed to obtain the testimony that would establish a survivor's chances of a particular complication—this is a function of the probabilities or a failure of plaintiff's proofs, not a flaw inherent in application of §2912a(2).

IV PLAINTIFFS FAILED TO MEET THE REQUIREMENTS OF §2912A(2).

Plaintiff contends that Dr. Flanigan's testimony that plaintiff had only a 1% chance of amputation with elective surgical repair, but a 100% chance of amputation once the aneurysm ruptured, creates an issue of fact. Dr. Flanigan actually testified that "for [plaintiff] it was 100%" "because it happened," i.e. because plaintiff was subsequently determined to have actually fallen within the group of people who "make up that percentage" of persons who have limb loss after rupture (Flanigan, TR 2/9/05, pp 38-39, Apx. Pp. 180a-181a). This was a true "retrospective" analysis of the type rejected in *Klein v Kik,* 264 Mich App 682 (2005), and is not sufficient to create a genuine issue of material fact.

Dr. Flanigan testified that there were "a number of things" that caused amputation, including blockages in the femoral arteries, the blood loss/low blood pressure due to the rupture, and the inability to give Heparin due to the bleeding after rupture (Flanigan, TR 2/9/05, pp 39-40, Apx. Pp. 181a-182a). He admitted that the low blood pressure is "common" with a ruptured aneurysm, and that the decision not to use Heparin after a rupture is the same decision made by "many surgeons" (Flanigan, TR 2/9/05, p 41, Apx. P. 183a). Thus, Dr. Flanigan attributed amputation to three factors without singling out one; and two of that

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factors are common to all patients with ruptures. Such testimony confirms that Dr. Flanigan's assertion that plaintiff's risk of amputation was 100% was not based on any unique condition removing him from the general complication rates, but was a "retrospective" analysis as rejected in *Klein, supra.* Further, the third factor, blockages in the femoral arteries, is a complication of both emergent and nonemergent surgery.

Plaintiff is disingenuous in asserting that Dr. Elanderson's testimony offered in opposition to the motion for summary disposition established the risk of amputation was 75%. While Dr. Elanderson testified that the risk of any tissue loss whatsoever in a patient with a ruptured aneurysm and occlusive disease (from part of a toe to a leg) was "somewhere between 50 and 75 percent" (and not 75 percent as represented by plaintiff), he indicated that the risk specifically for loss of a leg in such a patient was only 10 to 15 percent. (Apx 6b)

Dr. Casey's focus on "hemodynamic instability" as the reason for the difference between elective and emergent repair (Casey, TR 2/8/05, p 39, Apx. P. 103a), also fails to take Mr. Stone's condition out of the general statistics, as this is a risk of both procedures.

Finally, to the extent that plaintiff contends that there was a 100% chance of rupture absent elective repair, this does not establish a 100% chance of amputation, the injury for which plaintiff recovered, where plaintiff's experts acknowledged that amputation can occur with elective repair, and that emergency surgery does not necessarily result in amputation.

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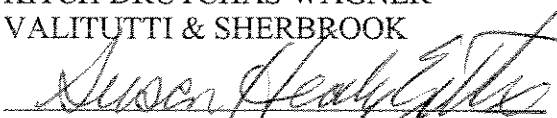
By: 

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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
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CARL STONE and NANCY STONE, Plaintiffs-Appellees,	Supreme Court No.
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DAVID A. WILLIAMSON, M.D. JACKSON RADIOLOGY CONSULTANTS, P.C., and W.A. FOOTE MEMORIAL HOSPITAL, jointly and severally, Defendants-Appellants	Jackson County Circuit Court No. 03 1912 NH

_____/

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

DORIS G. JONES, being first duly sworn, deposes and says that she is employed by the law firm of KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK and that on the 7th day of January, 2008, she did serve upon:

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TWO COPIES OF REPLY BRIEF FOR DEFENDANT-APPELLANT DAVID A. WILLIAMSON, M.D., JACKSON RADIOLOGY CONSULTANTS, P.C., AND W.A. FOOTE MEMORIAL HOSPITAL, ORAL ARGUMENT REQUESTED and AFFIDAVIT OF SERVICE

by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

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Further affiant saith not.

DORIS G. JONES

Subscribed and sworn to before me
this 7th day of January, 2008

Coretta Denise King
Notary Public,

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MY COMMISSION EXPIRES Nov 15, 2012

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